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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re

Broadband PCS C and F Block
Installment Payment
Restructuring

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WT Docket No. 97-82

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF NEXTWAVE TELECOM INC.

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SUMMARY

Since initiating its inquiry into whether to restructure installment payment plans or take other action to ensure that entrepreneurs' block spectrum is quickly disseminated, the FCC has heard from over 60 commenting parties and a host of participants at its public forum held on June 30. The record developed in this proceeding demonstrates that the public interest will be served by providing entrepreneurs' block licensees the option of modifying their installment payment plans to: (1) reschedule principal and interest payments over a longer term; or (2) accelerate payment of discounted principal within two years.

The record also demonstrates several entrepreneurs' block rules should be modified, in particular to: (1) subordinate the Commission's interests to those of equipment and other build-out capital creditors; and (2) permit the transfer of up to one-third of a BTA's MHz pops to another qualified entity without transfer of a pro-rata share of the government debt.

The arguments of those opposing restructuring have no legal or policy basis. The Commission's rules, adopted more than eighteen months prior to the beginning of the C-Block auction, are crystal clear on the Commission's ability to restructure payment schedules upon an appropriate showing of the need for relief. There simply is no theory of detrimental reliance or lack of notice that is now available to those opposing restructuring. Similarly, opponents' arguments that restructuring is an impermissible "retroactive" rulemaking is wrong both with respect to the facts and the Commission's well-established legal authority to modify rules when necessary to further the public interest.

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REPLY COMMENTS OF NEXTWAVE TELECOM INC.

NextWave Telecom Inc. ("NextWave"), by its attorneys, hereby submits its reply comments in response to the Commission's Public Notice in the captioned proceeding. As set forth below, the record in this proceeding demonstrates unambiguously that the public interest will be served by offering entrepreneurs' block licensees the option of modifying their installment payment plans to: (1) reschedule principal and interest payments over a longer term; or (2) accelerate payment of discounted principal within two years. The record also demonstrates that the public interest will be served by modifying several entrepreneurs' block rules, in particular to: (1) subordinate the Commission's interests to those of equipment and other build-out capital creditors; and (2) permit the transfer of up to one-third of a BTA's MHz pops to another qualified entity without transfer of a pro-rata share of the government debt.

I. INTRODUCTION

Approximately sixty parties responded to the Commission's Public Notice regarding the proposed restructuring of

entrepreneurs' block installment payments.^{1/} Numerous parties also participated in a public forum^{2/} conducted by the Wireless Telecommunications Bureau ("Bureau") regarding the issues in this proceeding.

The vast majority of commenters urge the Commission to adopt a plan to restructure installment payment plans swiftly, in recognition of market forces, as the best means of ensuring that entrepreneurs' block spectrum is rapidly put to use serving the public. Those commenters represent virtually every competitive segment of the wireless industry, including C and F Block licensees,^{3/} utilities,^{4/} rural telephone companies,^{5/} the nation's second largest wireline interexchange carrier,^{6/} the

^{1/} Public Notice, WT Docket 97-82, DA 97-679, released June 2, 1997.

^{2/} Public Notice, WT Docket No 97-82, DA 97-1356, released June 27, 1997.

^{3/} See, e.g., Comments of the Small Business Coalition; Comments of Horizon Personal Communications; Comments of ClearComm; Comments of Magnacom Wireless; Comments of Alpine PCS, Inc.; Comments of R&S PCS, Inc.; Comments of Duluth PCS, Inc., et al.; Comments of MFRI Inc.; Comments of Roberts-Roberts (NAPE), RFW, Inc.; Comments of OnQue Communications; Comments of Fortunet Communications, L.P.; Comments of Meretel Communications; Comments of Chase Telecommunications, Inc.; Comments of SouthEast Telephone; Comments of AmeriCall International, LLC; Comments of Holland Wireless, et al.; Comments of Urban Communicators; Comments of Pocket Communications; Comments of Indus, Inc.; and Comments of General Wireless, Inc.

^{4/} See, Comments of Brookings Municipal Utilities and Comments of United Calling Network, Inc.

^{5/} See, Comments of Tennessee L.P. 121.

^{6/} See, Comments of MCI Communications Corporation.

third largest wireless carrier,^{7/} and investors and other members of the financial community.^{8/} Additionally, the National Wireless Resellers Association filed in favor of restructuring, noting that resellers' ability to compete hinges on the success of entrepreneurs' block licensees' efforts to offer a new entry path into the highly concentrated wireless marketplace.^{9/} As previously noted, to date NextWave has entered into airtime resale agreements with over two dozen wireless service providers that have committed on a "take or pay" basis to purchase in excess of 35 billion minutes of use of airtime. This unprecedented commitment to purchase airtime in fact exceeds the 35 billion minutes of airtime purchased from all providers of cellular services in the cellular industry during 1996. As a whole, these comments demonstrate that restructuring will "further national telecommunications policy while also recognizing and supporting the national budget improvements realized through spectrum auctions."^{10/}

^{7/} See, Comments of Southwestern Bell Mobile Systems ("SBC").

^{8/} See, Comments of Bear, Stearns & Co., Inc.; Comments of BIA Capital Corp.; and Comments of Rural Telephone Finance Cooperative.

^{9/} Comments of the National Wireless Resellers Association at 2; See, also, Comments of United Calling Network, Inc.; Comments of 2001 Personal Communication Inc.; Comments of Fox Communications; Comments of Prepay Technologies; Comments of OneStop Wireless; Comments of CX Systems Int'l., Inc. and Comments of Cellexis International, Inc.

^{10/} Comments of Indus, Inc. at 2.

Additionally, commenters generally supported expeditious Commission action in resolving the restructuring issues. Notably, the witnesses on the financial community panel at the FCC's public forum held on June 30 were unanimous in the view that any delay in deciding the restructuring issues, given the delays in the C-Block auction and licensing, will give the A- and B-Block licensees a nearly insurmountable time to market advantage.^{11/} The suggestion was made that the FCC must act "quickly--in weeks not months" (John Bensché) and that, if the Commission has not acted by Labor Day, then the "game is up" for meaningful C-Block competition (Brian O'Reilly). It was further pointed out that, for the 15% of PCS licensees that are not affiliated with a RBOC or long distance company, the window of opportunity to get into the market is "starting to close" (Mark Lowenstein).

By contrast, a minority of commenters, led principally by incumbent wireless companies, take issue with both the propriety of restructuring and the Commission's authority to implement it.^{12/} These comments do not establish how the public interest would be served by defaults and reauctions that will delay service to the public, weaken competition, and reduce auction receipts to the U.S. Treasury.

^{11/} Participants on the panel were Norman Frost of Bear, Stearns, John Bensché of Lehman Brothers, Brian O'Reilly of Toronto Dominion Bank, Gregg Johnson of BIA Capital, and Mark Lowenstein of the Yankee Group.

^{12/} See, e.g., Comments of BellSouth Corp.; Sprint Corp.; Comcast Corp.; and Nextel.

Restructuring is particularly important to achieve the goal of competition in a wireless market that is highly concentrated. In terms of industry concentration, an overwhelming majority of wireless licenses are controlled by a small number of wireline-affiliated companies. Today, wireline companies control 79% of the cellular licenses in the top fifty markets and 87% of the A- and B-Block PCS licenses in the same markets. Furthermore, ten wireline-affiliated companies control cellular and PCS licenses representing approximately two-thirds of the available U.S. POPs. As Congress recognized in creating the entrepreneurs' blocks, C- and F-Block licensees represent the first "new blood" to enter the wireless industry since its inception. Without restructuring the debt obligations of such licensees, however, wireline companies will continue to dominate the U.S. wireless competitive landscape.

**II. IMMEDIATE RESTRUCTURING IS NEEDED TO
SATISFY CONGRESS' MANDATE OF DIVERSITY
AND TO DELIVER SERVICE TO THE PUBLIC QUICKLY**

The unambiguous public policy goal of Congress and the Commission in creating the entrepreneurs' block program was to create a meaningful opportunity for new entry into wireless by women, minorities and small businesses.^{13/} As one commenter put it:

[V]ariety achieves two significant public interest objectives. It distributes the ownership of licenses throughout a broader

^{13/} See, 47 U.S.C. §309(j)(4)(D); 47 U.S.C. §309(j)(3)(B); see also, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 2348 (1994) ("Competitive Bidding").

number of competitors, and it promotes a greater scope of services. Thus, the public, competition, and consumers all benefit. These benefits are of such overwhelming significance for our country that other purposes of auctions are secondary. If it is necessary to subordinate any secondary goals to achieve the primary goals, then the Commission must do so.^{14/}

Despite well recognized delays in auctioning and licensing C and F block spectrum, the record demonstrates that the deployment of competitive, DE-owned wireless infrastructure is well underway. NextWave alone has already expended more than \$80 million for build out activities, including incumbent microwave relocation, cell site design and leasing, switch construction, and the test operation of CDMA-based network equipment in several regions.^{15/} Other licensees are progressing similarly by obtaining vendor financing, forging roaming and other types of operational agreements, and deploying infrastructure. Such efforts underscore the bona fide nature of entrepreneurs' block operations and illustrate that restructuring will clearly best serve the public interest by increasing wireless competition expeditiously.

Without restructuring, the prospects for a build out by competitive entrepreneurs in any reasonably foreseeable time frame are quite remote. The Chapter 11 bankruptcy filing of Pocket Communications underscores that licensees are not empowered under existing circumstances to simply turn back quickly their licenses

^{14/} Comments of SBC, Inc. at 2-3.

^{15/} Comments of NextWave at 15-16.

to the Commission when faced with financial difficulty. In accordance with traditional principles of commercial law, licensees are bound to make every reasonable effort, and utilize every available legal avenue, to protect their investors' financial interests. In the meantime, the uncertainty created by this gradual exodus will hamper other, more healthy C Block licensees by preventing them from obtaining financing, building out, and entering into proactive operational arguments with their C and F Block neighbors.

The practical effect of these circumstances is that there will not be any near-term large scale C Block build out, and "reauctions", if they ever occur, will be years away.^{16/} That time delay alone will likely serve to remove any realistic prospect that new licensees will contribute to the public good, either by providing competitive service to the public or by contributing additional funds to the U.S. Treasury. No commenter has presented a credible alternative scenario, nor identified what competing public policy could justify such a result.

III. RESTRUCTURING IS NECESSARY DUE TO UNFORESEEABLE AND DRAMATIC CHANGES IN EVENTS

The record demonstrates that when the C Block auction was ongoing, dominant trends in the wireless marketplace were positive and provided a reasonable basis for relying on the prospects for

^{16/} The adoption of an "amnesty" program, whereby entrepreneur block licensees would be permitted to turn in their licenses without penalty, will not materially alter this situation unless down payments are refunded or licensees are allowed to apply such amounts in a reauction.

securing entrepreneurs' block financing. Parties had paid record prices for spectrum in the recently completed A and B Block auction, despite the relative lack of competitive bidding in that auction. Initial PCS operating results surpassed all expectations.^{17/} Stocks of high profile start-up wireless entities were at an all time high.^{18/} At the very start of the C Block auction, December 1995, the Commission had concluded tentatively that LEC-CMRS interconnection should be priced at a "bill and keep" basis, that is to charge a rate of zero for terminating traffic.^{19/} Such an environment provided considerable justification for comparatively high C Block bid prices -- both to successful C Block bidders and to their financial consultants -- thereby removing any legitimate claim that C Block licensees bid recklessly. Neutral observers of Commission auctions confirm this analysis.^{20/}

^{17/} For example, Paul Kagan and Associates estimates that APC/Sprint Spectrum has 188,000 subscribers in the Washington, DC MTA as of March, 1997 and is growing at a rate of 25% per quarter, as opposed to quarterly cellular growth rates of 5%.

^{18/} For example, on October 16, 1996, Omnipoint Corporation reached its all time high of \$34 3/4. By April of 1997, the stock had fallen to an all time low of \$7 and has since recovered to the \$15-\$16 range.

^{19/} See, In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Notice of Proposed Rule Making, 11 FCC Rcd. 5020 (1996).

^{20/} See, Congress of the United States, Congressional Budget Office, "Where Do We Go From Here? The FCC Auctions and the Future of Radio Spectrum Management" (April 1997) at 19, 21-22; see, also, Wireless Services, Spectrum Auctions, and Competition in Modern Telecommunications, Thomas V. (continued...)

Since the close of the auction, virtually all that could have gone wrong in spectrum financing markets, particularly for high risk new entrants, has gone wrong. In the ten months following the C Block auction, wireless equity prices dropped over 70 percent, reaching a nadir in March, 1997.^{21/} Start-up entities have not been able to access the equity and high yield markets.^{22/} The Commission retreated from its previously stated position of "bill and keep" for LEC-CMRS interconnection.^{23/} Also, it was not

^{20/} (...continued)

Duesterberg and Peter K. Pitsch (May, 1997). It is worth noting that several unsuccessful bidders or their investors who argue against restructuring placed very high bids during this highly competitive auction; Cook Inlet Western Wireless bid \$67.77 per pop for Seattle, Go Communications bid \$58.24 per pop for Miami; and NorthCoast bid \$52.45 per pop for New York.

^{21/} See Comments of NextWave, Appendix A at 30.

^{22/} Last month, another supposedly well financed C Block start up venture, Chase Telecommunications, Inc., which previously announced branding and strategic relationships with PCS PrimeCo and QUALCOMM, announced that its \$160 million high yield debt offering has been postponed indefinitely. Even established, publicly traded carriers with positive operating results, such as Intercel, have had difficulty accessing capital. Intercel's high yield debt offering was substantially postponed before its successful sale late last month.

^{23/} Press reports after the close of the C Block auction indicated that the FCC might change its position on this issue. See, "Possible Retreat by FCC on Bill and Keep Concerns PCS Licenses", Communications Daily (June 26, 1996), and "PCS Firms Fear FCC Retreat on Bill and Keep", Telecommunications Reports (July 1, 1996). The Commission's position was solidified in its Interconnection Order, where it chose not to adopt a "bill and keep" regime. See, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), stayed in part (continued...)

until after the close of the auction that C Block bidders became aware that they were expected to sign notes.^{24/} In 1997, Government policy concerning spectrum auctions has also produced uncertainty in the financial markets, as investors seek to understand the impact of the auction of additional spectrum and the wireless services that may be offered over such spectrum.^{25/} All these events have combined to create uncertainty in commercial markets concerning the wisdom of spectrum investment opportunities, which has had the concomitant effect of driving spectrum values to levels that are considerably below the environment in which the Commission conducted its C Block auction. No commenter has provided

^{23/} (...continued)

pending judicial review sub nom. Iowa Utils. Bd. v. FCC, 109 F. 3rd 418 (8th Cir. 1996).

^{24/} In auctions prior to the C Block, designated entities with installment payment obligations, such as Interactive Video and Data Services ("IVDS") and regional narrowband paging licensees, were not required to sign notes. C Block bidders first became aware of a change in policy when notes and security agreements were sent out by the Commission on October 2, 1996.

^{25/} This uncertainty has led to a very cautious valuation of wireless spectrum while financial community awaits and processes the reaction of consumers as the new services become commercially available. The FCC has experienced the effects of these changes first hand in its most recent auction of wireless spectrum. In particular, the recent WCS auction provided disappointing bids and has spawned a number of legislative initiatives over auctions and spectrum fees. The pending budget bill has at various times contained numerous proposals which would, among other things, affect how future auctions are conducted, whether the FCC can default the licenses of bankrupt companies, how much new spectrum would be allocated, and a host of other issues which directly affect Wall Street's assessment of the potential risks faced by a wireless start-up venture.

a credible basis for concluding that any bidder, no matter how foresighted, could reasonably have predicted that circumstances would change so rapidly and dramatically. Moreover, it bears emphasis that, even in the face of such material change, many commenters, including NextWave, have submitted restructuring proposals seeking reasonable commercial terms that would result in full payment to the government of their entire bid amounts, including interest.

**IV. ARGUMENTS OF RESTRUCTURING OPPONENTS HAVE
NO LEGAL OR POLICY BASIS**

For the most part, the "arguments" presented in opposition to restructuring rely entirely on conclusory pronouncements regarding the "need for integrity" of Commission rules, or disingenuous claims that post-licensing rule modifications to facilitate compliance with clear Congressional mandates are somehow impermissibly "retroactive". While the great majority of those claims are unsupported and fall of their own weight, others are cloaked in an aura of legitimacy. Upon examination they reveal themselves to be myths, wholly without basis in fact or law.

**MYTH #1: It Is Unfair To Alter Payment Schedules
Post-Auction Because Parties Relied On
Them To Their Detriment**

Several commenters claim that the Commission may not alter payment schedule rules post-auction because bidders relied on such

rules to their detriment.^{26/} This argument is empty at its core.

Well before the start of the C block auction, the Commission adopted section 1.2110(e)(4)(ii), which explicitly provides for restructuring of payment schedules. The rule addresses the grant of "grace periods" during which installment payments may be suspended, and it also expressly states that the Commission may "otherwise approve a restructured payment schedule" upon an appropriate showing of a need for relief.^{27/} Any question whether the rule contemplates a restructuring that alters payment terms fundamentally, beyond the temporary grace period, is settled by reference to the Commission's discussion of the rule:

During this grace period, a defaulting licensee could maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan (emphasis added).^{28/}

This rule was adopted more than a year and a half before the C block auction began. On its face, it provides for the suspension of payments while the Commission considers whether a fundamental restructuring of payment terms will serve the public interest. That is exactly the situation we are in today, and such

^{26/} See, e.g., Comments of BellSouth at 14-15.

^{27/} 47 C.F.R. §1.2110(3)(4)(ii).

^{28/} Competitive Bidding, supra, 9 FCC Rcd at 2391.

consideration is wholly in accordance with a long-established rule.^{29/} Thus, there is no foundation to claims that bidders acted to their detriment on a belief that the Commission's rules did not provide for restructuring, and those claims must be rejected out-of-hand.

The Commission should reject such claims for another reason. They appear to be predicated on a notion that, if a bidder had known restructuring was an option, it would have altered its bidding behavior in irresponsible ways. NextWave did not bid on that basis, nor is it aware of any entrepreneurs' block licensee who did. Such behavior would not have been successful in any event, as the rule contemplates that a licensee seeking restructuring must demonstrate a good faith effort to satisfy its license obligations, including bid payment and network build out requirements. There is no evidence on this record, or elsewhere to NextWave's knowledge, that any entrepreneurs' block licensee bid irresponsibly with an eye toward later seeking a restructuring of its payment terms under Section 1.2110(e)(4)(ii). NextWave has thus far paid nearly \$500 million to the U.S. Treasury for its entrepreneurs' block licenses, has invested more than an additional \$80 million in wireless infrastructure, and has submitted a restructuring plan under which its entire bid will be paid to the

^{29/} The Commission's decision to consider restructuring issues in this rulemaking, rather than in licensee-specific proceedings, is entirely within its procedural discretion. See, 47 U.S.C. §154(j).

government in full. Commission consideration of that plan is procedurally and substantively proper in all respects.

**MYTH #2: Modifying Rules Post-Auction
Is Unlawful "Retroactive" Rulemaking**

Certain parties argue that the Commission cannot change installment payment schedules because doing so is impermissible "retroactive" rulemaking.^{30/} Such arguments have no foundation in law because they ignore both the Commission's well-established authority to modify rules where necessary to further the public interest^{31/} and the Commission's obligation to do so.^{32/} They overlook the Commission's long tradition of improving the entire regulatory landscape, post-licensing,^{33/} where experience or changed circumstances indicate that doing so will further the public interest. Recent examples of such positive, pro-active

^{30/} Comments of BellSouth at 13-18; Comments of Nextel at 8-11.

^{31/} 47 U.S.C. §4(i) & 303; Comments of NextWave at 24-26.

^{32/} See, Bechtel v. FCC, 957 F.2d, 873, 881 (D.C. Cir. 1992) "Changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy...." See, also, Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752, 767 (6th Cir. 1995) and 47 USC §309(j)(3) ("the Commission shall seek to design multiple alternative methodologies under appropriate circumstances") and 47 USC §309 (j)(4)(A) ("The Commission shall consider alternative payment schedules and methods of [debt] calculation" that promote the statutes of overall auction objectives).

^{33/} In certain instances where, as here, the changes serve only to better the position of licensees or applicants, rule changes can be made even prior to initial licensing. See, e.g., Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 FCC 2d 175 (1984).

efforts on the Commission's part in the wireless arena include the following:

- o Conveying to all cellular licensees, free of charge or competition from new entrants, an additional 5 MHz of spectrum;^{34/}
- o Enlarging, by approximately 33 percent, the protected zone of interest for all incumbent cellular carriers;^{35/}
- o Removing restrictions on service by wireless carriers to fixed points;^{36/}
- o Removing cumbersome regulation and imposing new regulation to improve wireless carriers' rights vis-a-vis landline interconnection parties.^{37/}
- o Creating Enhanced Specialized Mobile Radio Systems ("ESMR"), a competitive broadband CMRS carrier, by waiver of the Commission's rules, in the 1991 Fleet Call Inc. (Nextel) decision.^{38/}
- o Granting waivers to WirelessCo., L.P., Phillieco, L.P., and Sprint Corporation to complete post-auction cellular

^{34/} Cellular Communications Systems, 2 FCC Rcd 1825 (1986).

^{35/} Amendment of Part 22 of the Commission's Rules, 7 FCC Rcd 2449 (1992).

^{36/} Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, 11 FCC Rcd 8965 (1996).

^{37/} Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1467-72 (1994); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 11 FCC Rcd 15499, 15995-97 (1996).

^{38/} See, Request for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, 6 FCC Rcd 1533 (1991).

divestiture from within 90 days of final license grant to one year plus 90 days post-auction.^{39/}

This list could be extended almost endlessly, but even this abbreviated list is sufficient to undermine the opponents' argument that the Commission should not improve regulation of wireless licensees because, had other parties known that these changes would be forthcoming, they may have taken more aggressive action in the prior licensing process.

In any event, claims about "retroactivity" lack a factual predicate. The act of restructuring payment obligations can have, and will have, only prospective effect. The Commission's decision in this proceeding will determine only the terms of future payments, and only for entities that did not even exist until recently, the entrepreneurs' block licensees. Rhetoric about "retroactive" rulemaking reduces to a generalized claim that the Commission is forbidden to act on the basis of experience or changed circumstances, and modify its rules accordingly. Such a claim is contrary to settled law.

MYTH #3: Title 31 Bars Any Payment Restructuring

BellSouth has claimed that provisions contained in Title 31^{40/} restricts the Commission's authority to discount the principal amount owed by C Block licensees in its debt

^{39/} In re Request of WirelessCo., L.P., Phillieco, L.P., and Sprint Corporation, 10 FCC Rcd 11111 (1995).

^{40/} See, e.g., 31 U.S.C. §3711.

restructuring efforts.^{41/} The Commission retains exclusive jurisdiction over interstate and foreign commerce in wire and radio communication.^{42/} Yet, the position suggested by BellSouth would transfer to another agency the Commission's legitimate and exclusive authority to develop policies and rules governing interstate radio communication.^{43/}

An examination of Section 309(j) reveals strong Congressional intent contradicting BellSouth's position. If given effect, the BellSouth argument would allow the general provisions of Title 31 to eviscerate much of the authority and directive specifically granted the Commission under the Communications Act generally and Section 309(j) specifically.^{44/} Simply put, BellSouth's reading of Section 3711^{45/} is irreconcilable with Section 309(j) and, because the latter was more recently enacted, the provisions of Section 309(j) must be given the operative effect.

Several provisions of Section 309(j) support the position that Congress did not intend to subject the Commission's auction

^{41/} See, Comments of BellSouth at 10.

^{42/} See, 47 U.S.C. §151.

^{43/} BellSouth asserts that the Director of the Office of Management and Budget ultimately would determine whether C Block carriers would receive the requisite principal discounts. Comments of BellSouth at 11.

^{44/} 47 U.S.C. §309(j); See, Morton v. Mancari, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one").

^{45/} 31 U.S.C. §3711.

authority to Title 31. For example, Section 309(j) grants competitive bidding authority to the Commission, and refers to Section 309(j)(10) as the only limit upon this authority.^{46/} Notably, Section 309(j)(10) does not refer to Title 31.

In fact, Section 309(j) appears to compel Commission action that would violate Section 3711 were it applied. For example, the Commission is encouraged to consider the use of tax certificates as a means of encouraging small business participation in providing spectrum-based services, without limiting the amount of such certificates to \$100,000.^{47/} Moreover, the Commission must grant qualified Pioneer's Preference licensees a 15 percent discount off the prices bid for comparable licenses.^{48/} The statute does not limit the total amount of the discount. It is worth mentioning that the Commission has already used this provision. In granting Pioneer's Preference licenses for PCS, the Commission unilaterally discounted the sums owed by amounts well in excess of \$100,000.^{49/}

^{46/} See, 47 U.S.C. §309(j)(1) ("the Commission shall have the authority, subject to paragraph (10), to grant such license... through the use of a system of competitive bidding") (emphasis added).

^{47/} See, 47 U.S.C. §309(j)(4)(D).

^{48/} See, 47 U.S.C. §309(j)(13)(B)

^{49/} See, American Personal Communications Washington-Baltimore MTA #10 Frequency Block A, et al., 11 FCC Rcd 12384, 12386 (1996) (granting: (1) APC a discount of \$109,427,461 off the comparable winning B Block license bid; (2) Cox a discount of \$241,581,474 off the comparable winning B Block license bid; and (3) Omnipoint a discount of \$95,193,691 off the comparable winning B Block license bid).

One cannot reasonably reconcile Section 309(j)'s restricted limitation on authority, Section 309(j)(4)(c)'s requirement not to consider revenue and the directive to grant tax incentives and substantial payment discounts with Section 3711's limitation of independent Commission action to \$100,000. Attempts to reconcile the two in a manner that adopts BellSouth's recommendation would impair severely the Commission's express statutory authority and transfer its discretion to an agency without authority over interstate radio communication.^{50/}

**V. ADOPTING TWO GENERIC RESTRUCTURING OPTIONS WILL
REDUCE THE FCC'S ADMINISTRATIVE BURDENS AND PROVIDE
FINANCIAL FLEXIBILITY TO C-BLOCK LICENSEES OF ALL SIZES**

The Commission has before it several proposals to restructure C Block debt. It is important that Commission remain flexible and adopt restructuring options that suit the needs of the variously-situated C block licensees.^{51/} While the proposals contained in

^{50/} The alleged irreconcilable conflict compels application of the "repeal by implication" doctrine. This principle of statutory construction requires that "where provisions in...two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one." The \$100,000 limit in Section 3711 of Title 31 was enacted in 1990 while Section 309(j) of the Communications Act was enacted three years later in 1993, with the exception of subsection (j)(13) which was enacted in 1994. Thus, under the doctrine of repeal by implication, the provisions in Section 309(j) control contrary provisions in Section 3711. In short, the Commission's independent authority to discount principal amounts owed in excess of \$100,000 is not constrained by Title 31.

^{51/} See, e.g., Comments of Small Business Coalition at 7, "it is unlikely that there exists a single solution appropriate for all C Block licensees." See, also, Comments of Horizon Communications at 10. "Because each licensee's circumstances (continued...)

the comments take many forms, upon examination, two positive courses emerge: the Commission can accommodate the vast majority of commenters by rescheduling payments over a longer term with deferred interest and by offering an accelerated pre-payment incentive.

A. Long Term Repayment with Deferred Interest

Several commenters agree with the concept underlying NextWave's baseline proposal, that is, to extend the repayment term and to accompany that lengthened term with deferred cash interest in the early years.^{52/} These commenters propose to improve C Block licensees' valuations and better match licensees' cash obligations in early years with projected cash receipts. By extending the repayment term and deferring interest in the early years, such plans permit the licensee to access the capital markets and use that capital to build its network rather than make payments to the government. Like NextWave, several commenters also seek to keep the government whole.^{53/}

^{51/} (...continued)

are unique, Horizon believes that no single solution can meet every company's needs."

^{52/} See, e.g., Comments of Alpine, Americall, BIA Capital, Chase Telecommunications, Clearcomm, Fortunet, GWI, Indus, MCI, Merotel LP, National Association of PCS Entrepreneurs, Omnipoint, PCS Plus, R&S PCS, R. Vega Group and Urban Communicators.

^{53/} See, e.g., Comments of Holland Wireless L.L.C., et al. at 2; and Comments of Urban Communications at 9. The Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO") have determined that C Block debt falls under the Federal Credit Reform Act and is thus considered a "direct
(continued...)

B. Accelerated Prepayment

Many commenters suggest that the Commission should adopt a prepayment option. The obvious benefits of such an option are that, as Bear Stearns states, "[i]n this way, the licenses (by far the most important tangible asset of the C-block licensees) are not subject to revocation for financial reasons."^{54/} Furthermore, prepayment would allow "new senior lenders to collateralize their

^{53/} (...continued)

loan." CBO Report at 33. For budgetary purposes, C Block debt is treated according to the guidelines outlined in OMB Circulars A11 and A34. U. S. Office of Management and Budget, Circular No. A-11 (1996) Section 33 and Circular No. A-34 (Dec. 1995), Section 12. Once a year the government determines a "subsidy rate" for each class of direct loans, which includes any interest rate subsidy (which OMB and CBO have determined for C Block debt to be zero) and an assessment of the default rate. CBO Report at 33. Because there is no interest rate subsidy for C Block debt, the current subsidy rate is based entirely on OMB estimates of default and the potential for revenue raised at reauction. NextWave believes that 12% subsidy rate OMB and CBO calculated earlier in the budget cycle was based on the more positive outlook for wireless shared at that time by most C Block bidders and investors. If the government were permitted to recalculate the subsidy rate now, in mid-budget cycle, NextWave believes this rate would reflect current market conditions and an increased risk of default and thus would be much higher than 12 percent currently on the budget. Adopting the long-term repayment plan with deferred interest that NextWave proposes in its comments would only increase the amount of reimbursement the government can expect to receive from the C Block.

NextWave understands that, to keep the interest rate subsidy at zero, given that the government's cost of capital is based on the Treasury note rate that corresponds to the bond issue with the same term as that of the "direct loan", the government would probably be required to increase the C Block interest rate by 20 to 30 basis points to match the government's cost of money for longer-term maturities.

^{54/} See, Comments of Bear Stearns at 4.

obligations with the licenses, at least indirectly, using the shares of the license-holding entity."^{55/}

Under this option, the Commission sets a discounted price at which a C block licensee could prepay its debt. NextWave agrees with those commenters, particularly panelists at the FCC's recent public forum who suggest that such an option would require the FCC to discount steeply the prices paid at the C block auction.^{56/} In addition to a steep discount, as NextWave mentions in its comments, the Commission would have to provide an adequate payment window in order for financial markets to be able to accommodate the capital requirements of all licensees choosing the accelerated prepayment incentive option to work for all licensees.^{57/}

VI. OTHER C BLOCK RULES MUST BE MODIFIED

NextWave agrees with those commenters who believe that restructuring must also include several rule changes.^{58/} In

^{55/} Id. The FCC could provide these benefits of prepayment acceleration and keep the government whole by subordinating its debt to vendor and working capital financing. See, infra, Section VI.

^{56/} See, n. 10, supra; see, also, Comments of BIA Capital at 2-3. ("For example, the licensee would be trading debt capital with costs 7% (government debt) for equity capital which has a cost ranging from 30%- 40%.")

^{57/} In Appendix A to NextWave's Comments, BT Wolfensohn suggests two years is an appropriate financing window. See, Comments of NextWave, Appendix A at 5.

^{58/} Comments of Tennessee L.P. 121 at 2-6 (control group rules); Comments of Brookings Municipal Utilities at 2-3 (build out requirements); Comments of Americall at 8-9 (security interest priority for vendors); Comments of Fortunet at 5-6 (transfer restrictions).